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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-203288

DATE: September 1, 1981

MATTER OF: Ferrotherm Company

DIGEST:

Bid which was hand carried to military duty officer on weekend when base was closed and which duty officer requested be delivered during normal business hours was properly determined to be late when delivered after 10:00 a.m. bid opening time on Monday. Duty officer was not duly authorized representative of contracting officer and agency's failure to provide for receipt of bids outside of normal business hours was not unreasonable and, in any event, was not paramount cause of late delivery.

Ferrotherm Company protests a determination of the contracting officer that its bid submitted in response to invitation for bids (IFB) No. N00244-81-B-2252 could not be considered because it was late. Ferrotherm contends the Naval Supply Center, San Diego, California improperly refused to accept delivery of its bid two days before the specified bid opening date. For reasons discussed below, this protest is denied.

The IFB provided that bids would be received, if hand carried, in the bid box until "10:00 a.m. local time May 4, 1981." The clause set out in Defense Acquisition Regulation (DAR) § 7-2002.2 entitled "Late Bids, Modifications of Bids or Withdrawal of Bids (1979)" was incorporated by reference.

Ferrotherm's bid was delivered to Federal Express which sent a courier to the Center on Saturday, May 2, when the Center was closed with only a military duty officer and a contract security guard present. The parcel was addressed to the contract negotiator by name but not by title or location within the Center. Neither the duty officer nor

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the guard recognized the addressee and neither had a personnel roster for the Center. When the courier was asked if he could deliver the parcel on Monday, he stated it would present no problem and the parcel was hand carried by another courier on Monday morning to the proper office but it arrived at 10:22 a.m. As it had not been sent by registered or certified mail at least five days prior to bid opening, the contracting officer determined it to be a late bid which could not be considered.

Although one other bid, also carried by Federal Express, was rejected because it was late, three bids were received on time. Ferrotherm made a timely protest to this Office and award has been withheld pending this decision.

Ferrotherm contends that as the duty officer and the guard were duly authorized agents of the contracting officer, the bid should have been accepted by them and deposited in the bid box located on the floor above and that Ferrotherm should not be penalized because of the negligence of the contracting officer in failing to instruct them with respect to receiving bids. Ferrotherm also argues that once the bid was properly tendered within the time specified to an agent of the contracting officer, the "mishandling" by the Government should be treated as though the bid had been mailed.

The Air Force contends that as Federal Express was Ferrotherm's agent for purposes of delivery, it was Ferrotherm's responsibility to insure that Federal Express made a proper delivery and that it was unreasonable to expect delivery could be made outside of normal business hours. The Air Force states that neither the duty officer nor the security guard was an authorized agent of the contracting officer and that their reactions to the attempted Saturday delivery were reasonable. It points out that the courier agreed to have the Federal Express parcel, on which the bid opening schedule was prominently displayed, delivered on Monday from its facility located within two miles of the Center. The Air Force argues that there was no mishandling because the parcel was not "received" on Saturday, and in the alternative that even if the duty officer's action might be construed as mishandling, it cannot be demonstrated that his actions were the paramount cause for the late delivery on Monday.

It is well established that the bidder has responsibility for insuring that its bid is delivered to the proper place at the proper time and in accordance with all requirements of the solicitation. Although the general rule is that a late hand carried bid may not be considered, there is an exception when it can be shown that wrongful action by the Government was the sole or paramount cause for the late receipt and the bidder did not significantly contribute to the late receipt by acting unreasonably in fulfilling its responsibility. Sound Refining Inc., B-193863, May 3, 1979, 79-1 CPD 308; S & Q Corporation, B-186794, November 11, 1976, 76-2 CPD 402. The record here does not demonstrate that there was any improper action by the Government which was the paramount cause for the bid being late.

First, it is not denied that the initial attempted delivery was not made during regular business hours. Second, despite Ferrotherm's contention that the duty officer and the contract guard were duly authorized representatives of the contracting officer for the receipt of bids, the Air Force denies that such persons had authority to act for the contracting officer in this regard or that their authority extended beyond security matters and there is no evidence that the duty officer and the guard were duly authorized representatives of the contracting officer. Neither do we believe such authority reasonably can be implied by their mere presence at the base outside of normal business hours. Moreover, we think it would be explaining the obvious for the solicitation to have warned prospective bidders that the contracting office and the base would not accept bids on Saturdays.

Ferrotherm cites a number of our previous decisions in support of its position that the Saturday tender of its bid was improperly refused. We think Ferrotherm's reliance on these cases is misplaced because there are significant differences in the facts presented here and in the cited cases. In Scot Incorporated, 57 Comp. Gen. 119 (1977), 77-2 CPD 425, where delivery of the bid was attempted during normal business hours at the office designated in the solicitation, the bid remained in the Government's custody after delivery and the bid was late solely due to the Government's mishandling, we held the bid could be considered. In the case at hand, the bid was not delivered until after the specified time and the earlier delivery was attempted outside of normal business hours to unauthorized personnel. In I&E Construction Company, Inc., 55 Comp. Gen. 1340 (1976), 76-2 CPD 139, we held that a telegraphic bid modification which was received late could be considered because the lateness was caused by

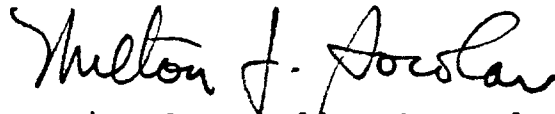
Western Union's inability to make timely delivery on the day of bid opening due solely to the fact that the designated building was locked during normal business hours while all its employees were attending a retirement luncheon. In the instant case, there was no action by the Government which prevented delivery during normal business hours.

In Hydro Fitting Manufacturing Corporation, 54 Comp. Gen. 999 (1975), 75-1 CPD 331, where a telegraphic bid was transmitted at 4:45 p.m. four days prior to bid opening and automatically acknowledged by the agency's Telex machine before bid opening, we held the bid could be considered even though the Telex machine had run out of paper, thereby preventing the message from being recorded and delivered to the procurement office on time. Before the protester could have known of the Telex malfunction, it sent to the agency a copy of its transmission containing the contents of its bid, the time of the hook-up with the agency's telex, the time of transmission and the agency's acknowledgement of receipt symbol. The authenticity of this evidence showing the Government mishandled the receipt of the bid was clear. We stated that the circumstances resulting in the Government's failure to have actual control over the bid or evidence of timely receipt were not contemplated by DAR § 7-2002.2 and that there was no reason to conclude that consideration of the bid would impugn the integrity of the competitive bid system. We think the failure of the agency here to provide for the receipt of hand carried bids outside of normal working hours cannot be equated to the failure of the agency in the Hydro case to monitor its communication equipment.

In Hyster Company, 55 Comp. Gen. 267 (1975), 75-2 CPD 176, and in 40 Comp. Gen. 709 (1961), we held that bids should be considered so long as they were in the hands of Government representatives authorized to receive bids at the scheduled times for bid opening even though in the Hyster case the bid had not been deposited in the bid box and in 40 Comp. Gen. 709 the bid had not been first delivered to a designated room before submission to the bid opening officer in the bid opening room. The Ferrotherm bid was not submitted to an authorized Government representative until 22 minutes after the time specified for bid opening.

In Southern Oregon Aggregate, Inc., B-190159, December 16, 1977, 77-2 CPD 477, affirmed upon reconsideration, February 1, 1978, 78-1 CPD 95, the protester's bid was delivered by a commercial carrier to a building other than that specified in the solicitation because the protester stated that was standard practice at that facility. The bid was then lost and not found until after bid opening. We held that since the common carrier delivered the bid to the wrong address on its own initiative, any subsequent mishandling by the Government was not the paramount reason for the late receipt and that the bid was properly rejected. Again, we find no support for Ferrotherm's position in the holding of this case.

The protest is denied.



Acting Comptroller General
of the United States